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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. [redacted] 113

AMEREX HOLDING CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The above-named petitioner, by the undersigned, its attorney, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit filed March 19, 1941 (R. 763) affirming a final order and decision of the Board of Tax Appeals filed August 22, 1938 (R. 67).

Opinions Below.

The findings of fact and opinion of the Board of Tax Appeals (R. 19-66) are reported in 37 B. T. A. 1169. The memorandum opinion of the Circuit Court of Appeals, handed down March 3, 1941 (R. 762), is reported in 117 F. (2d) 1009.

Jurisdiction.

The case was brought to the court below by petition for review (R. 68-88) filed November 18, 1938, pursuant to the provisions of Sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended. (See Title 26, U. S. C. A., 1934 Edition, Internal Revenue, Sec. 641, 642; now Title 26, U. S. C. A., Internal Revenue Code, Sec. 1141, 1142.)

The opinion of the Circuit Court of Appeals was handed down March 3, 1941 (R. 762); its judgment was filed March 19, 1941 (R. 763). The jurisdiction of this Court is conferred by Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

Statement.

The decision of the Board of Tax Appeals sustained the determination by the Commissioner of Internal Revenue (R. 12) of a deficiency of $510,226.02 in Petitioner's 1928 income tax and disallowed Petitioner's claim for refund of tax paid for said year in the sum of $55,638.90. The deficiency and the denial of the claimed refund resulted from the disallowance of Petitioner's claimed loss upon the liquidation of its wholly owned subsidiary, Mechanics Securities Corporation (hereinafter called Mechanics Securities).

All the shares of stock of Mechanics Securities were acquired by Petitioner in 1926 and 1927, under circumstances more fully set forth below, by issuing and exchanging therefor, share for share, 100,000 shares of its capital stock. Petitioner's shares so issued and exchanged constituted one-fourth of its total issued and outstanding shares of stock and had an aggregate value based upon

Petitioner's then net worth of not less than $5,270,545.94. In 1928 Mechanics Securities was dissolved and Petitioner received on final liquidation $444,816.94. Petitioner claimed the resulting loss as a deduction in its 1928 income tax return. It was the disallowance of all but $55,183.06 of this claimed loss which resulted in the deficiency complained of and the disallowance of Petitioner's claim for refund.

The essential facts were agreed upon and are contained in a stipulation and exhibits referred to therein (R. 91-104; received in evidence, R. 104, 105, 107). In addition there was testimony by two witnesses and a few other exhibits were introduced (R. 108-143).

Organization of Petitioner. Petitioner is a New York corporation organized in 1917 under the name Chase Securities Corporation. (Its name has been changed, first to The Chase Corporation and later to Amerex Holding Corporation.) It was formed at the instance of stockholders of The Chase National Bank of the City of New York (hereinafter called Chase Bank), under an arrangement by which their respective interests in Chase Bank and in the new corporation would be the same, to take advantage of business opportunities which were not available to the bank because of its limited corporate powers, and to engage in a general securities business (R. 21, 22).

All of the stockholders of Chase Bank became parties to a deposit agreement between a committee of Chase Bank stockholders and Bankers Trust Company as depositary, and deposited thereunder their shares, then aggregating 100,000 (R. 22, 547). A special dividend of $25 per share was paid by Chase Bank to the committee, which acted throughout as agent for the depositing stockholders. The committee then caused Petitioner to be organized with $2,500,000 capital, represented by 100,000 shares without par value which were subscribed for in the names of the

depositing Chase Bank stockholders, paid for with the proceeds of the special dividend, delivered to the committee and deposited under the deposit agreement (R. 22, 94). To evidence the ownership of the deposited shares of Chase Bank and of Petitioner the depositary issued to each depositing stockholder a definitive engraved receipt in registered form certifying that it held in his name a certificate for his shares of Chase Bank stock and a certificate for his shares of Petitioner's stock (R. 22, 94, 553, 567).

Each of the depositing stockholders agreed (Deposit Agreement, par. Sixth, R. 22, 556) that he would not sell any of his shares of either Chase Bank or Petitioner without at the same time selling to the same purchaser an equal number of shares of the other. Petitioner's certificate of incorporation provided that no shares of its stock issued to any Chase Bank stockholder should be transferable except together with an equal number of shares of Chase Bank and that the transfer of any shares of Chase Bank by a stockholder of Petitioner should operate *ipso facto* as a transfer of an equal number of its shares (R. 22, 373-4); and an amendment thereto in 1926 provided that no shares of Petitioner's stock should be issued unless made available for deposit under the deposit agreement and that no stockholder should be entitled to subscribe for newly issued stock of Petitioner unless at the same time he subscribed for an equal number of shares of Chase Bank and deposited all such shares with the depositary (R. 45-6, 418-9).

The purpose of the foregoing arrangements was to establish and maintain 100% parity of ownership of stock of the Chase Bank and of Petitioner (R. 36-7, 564-5, 583, 595), and such parity was maintained during all the times here involved. Prior to 1926 the outstanding shares of Chase Bank were increased to 200,000, and the outstanding

shares of Petitioner were correspondingly increased and all additional shares of each were deposited under the deposit agreement (R. 23, 94-5).

Organization of Mechanics Securities. On February 11, 1926, Chase Bank and the Mechanics & Metals National Bank of the City of New York (hereinafter called Mechanics Bank) entered into an agreement for the consolidation of the two banks under the name and charter of Chase Bank (R. 23-4, 92-3, 534).

The consolidation agreement provided that the consolidated bank should have a capital of $40,000,000, a surplus of $25,000,000 and (subject to intervening gains and losses in the ordinary course of business of the institutions and payment of regular quarterly dividends) undivided profits of not less than approximately $14,000,000, or a total of not less than approximately $79,000,000; that the capital should be divided into 400,000 shares of $100 par value, of which 200,000 shares should be allotted to the then stockholders of Chase Bank, share for share, 100,000 should be offered to the then stockholders of Chase Bank for subscription at $100 per share and 100,000 should be allotted to the stockholders of Mechanics Bank, share for share (R. 23-4, 536-7). The agreement further provided that, subject to the above conditions, Chase Bank should furnish to the consolidated bank not less than approximately $55,000,000, and Mechanics Bank not less than approximately $24,000,000, in net assets (R. 24, 537-8). In addition the agreement provided that $500,000 in assets of Mechanics Bank should be transferred before the effective date of the consolidation to a corporation, the stock of which should be distributed pro rata to shareholders of Mechanics Bank or their assigns upon whatever terms and conditions should be deemed proper by its Board of Directors (R. 24, 538).

On March 6, 1926, the Board of Directors of Mechanics Bank caused the incorporation of Mechanics Securities under the laws of New York with an initial capital of $500,000 represented by 100,000 shares of $5 par value (R. 44, 95, 569, 576) and prior to the merger Mechanics Bank transferred to Mechanics Securities (subject to retransfer in event the merger should not become effective) a note receivable for $500,000, and the latter issued its 100,000 shares in the names of the stockholders of Mechanics Bank (R. 47, 609-11, 624-729).

Exchange of Stock of Petitioner for Stock of Mechanics Securities. In order to maintain the parity of ownership of the shares of Petitioner and of Chase Bank (R. 115) Petitioner entered into an exchange agreement dated February 11, 1926 with a committee of Mechanics Bank stockholders and agreed if the merger of Mechanics Bank and Chase Bank became effective to exchange 100,000 shares of its stock, share for share, for the stock of Mechanics Securities (R. 31-6, 92, 529-533). At a meeting of stockholders of Petitioner the exchange agreement was ratified, an increase in authorized stock from 200,000 to 400,000 shares was approved and a proposal was approved to offer 100,000 of the additional shares to Petitioner's then stockholders for subscription at $5 per share (exercisable only on subscription at $100 per share for an equal number of shares of Chase Bank) and to issue the remaining 100,000 additional shares in accordance with the exchange agreement (R. 44-6, 596-7).

The merger of the two banks became effective at the close of business April 10, 1926 (R. 47, 99).

Pursuant to the exchange agreement Petitioner issued and delivered from April 12, 1926 to December 27, 1927,

100,000 shares of its stock in exchange for 100,000 shares of Mechanics Securities stock (R. 49, 100).

Thus all stockholders of Mechanics Bank who acquired shares of consolidated bank stock as a result of the merger acquired an equal number of shares of Petitioner's stock (R. 100-101). The 100,000 shares of Chase Bank offered to its shareholders at $100 per share and the 100,000 shares of Petitioner offered to its shareholders at $5 per share were fully subscribed for, issued and delivered. All of the 200,000 additional shares of Chase Bank and all of the 200,000 additional shares of Petitioner were deposited under the deposit agreement and the parity of ownership of Chase Bank stock and of Petitioner's stock remained as complete after the merger as before (R. 100-101).

It was stipulated (R. 111) and the Board found (R. 49) that the excess of Petitioner's assets over its liabilities during the period from April 10, 1926 to December 27, 1927 was at no time less than $21,082,183.76, the asset value of each of its 400,000 shares being therefore not less than $52.7054594.

Dissolution of Mechanics Securities. Mechanics Securities was dissolved on October 26, 1928 and on October 29, 1928 it was completely liquidated and Petitioner received all its assets, consisting of $444,816.94 in cash as a first and final liquidating dividend (R. 50, 101-2).

Petitioner's Contention. Petitioner's position before the Commissioner, before the Board and in the court below was and is that it issued 100,000 shares of its stock in exchange for 100,000 shares of Mechanics Securities stock; that the cost of said Mechanics Securities stock was the fair market value of its own stock issued in exchange there-

for; that such value was not less than $5,270, 545.94*; and that when in 1928 Petitioner liquidated Mechanics Securities and received $444,816.94 in cash, Petitioner sustained a deductible loss to the extent of the difference between the cost and the amount received, that is, a loss of not less than $4,825,729* (R. 52-3).

Commissioner's First Position. The position first taken by the Commissioner was "that subscription rights were vested in Mechanics Securities Corporation stockholders as to 100,000 shares of Chase Securities Corporation stock and that the conveyance of Mechanics Securities Corporation stock to the Chase Securities Corporation was in the exercise of such rights not a true 'exchange' of property and no actual loss was sustained." This position was taken in the Commissioner's statement (R. 13-15) attached to his notice of deficiency which was the basis of Petitioner's petition for redetermination in the Board of Tax Appeals, and in reliance upon the position so taken the voluminous stipulation of facts was entered into and the additional evidence was taken.

This wholly untenable theory was abandoned by the Commissioner and was not even referred to by the Board.

Commissioner's Second Position. A second theory was advanced by the Commissioner on the argument before the Board after the stipulation was entered into and after all the evidence had been taken. His new position was that the fair market value of Petitioner's shares issued in exchange for the shares of Mechanics Securities was necessarily limited to $500,000 because Petitioner was at no time free

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* Petitioner alleged in its petition before the Board that the fair market value of its shares was $8,280,549.90. Following the stipulation as to Petitioner's net worth (*supra*, p. 7) it claimed that the fair market value of its 100,000 shares of stock was not less that $5,270,545.94 and that its loss was not less than $4,825,729. In its return the loss claimed was $4,307,066.58 on the basis of a claimed fair market value of its shares of $4,751,883.52.

to offer the stock in question on the open market but was restricted in the use of said shares so that it could receive upon its issuance only the stock of Mechanics Securities which had assets of $500,000 only and therefore the loss on liquidation could not exceed the difference between that amount and the amount received as a final liquidating dividend, which difference was $55,183.06 (R. 53-4).

This position of the Commissioner, which we submit is equally untenable with his first position, the Board stated was not required to be determined (R. 59), although it was discussed in the Board's opinion (R. 53-8).

The Board's Position. The Board took a third position, wholly different from any which had been advanced by the Commissioner, as to which Petitioner had no opportunity to be heard, much less introduce evidence, and of which Petitioner had no notice until after the decision of the Board, as it was first mentioned in the findings of fact and opinion of the Board (R. 59-65).

The Board held that the 100,000 shares of Petitioner's stock were issued not alone for the 100,000 shares of Mechanics Securities stock but also as a part of the consideration for the assets of Mechanics Bank which were transferred to Chase Bank (R. 59, 64). This ruling was made by the Board notwithstanding its statement in its opinion that

> "Both parties have proceeded with the hearing under the assumption that the petitioner issued the said shares *solely* for all of the authorized capital stock of the Mechanics Securities Corporation, and if that assumption is correct, the total amount determined as the fair market value of the said 100,000 shares of petitioner represents the cost of the Mechanics Securities stock" (R. 59).

The Board might well have said that the whole case from beginning to end, including the pleadings, the stipulation and the taking of evidence, and finally the argument before it, had proceeded on that theory. At no time during the course of the proceeding was that underlying assumption of fact contested or even questioned.

The court below affirmed in the following *per curiam* opinion:

> "Although the tax involved is large, this appeal raises only disputed questions of fact as to which the board's findings are amply supported by the record. Decision affirmed." (R. 762).

Questions Presented.

1. Whether upon this record Petitioner should not be adjudged to have sustained in 1928 a deductible tax loss upon the liquidation of Mechanics Securities measured by the difference between the value of its stock (not less than $5,270,545.94) issued in exchange for all of the stock of Mechanics Securities and the amount received as a final liquidating dividend upon dissolution of Mechanics Securities.

2. Whether the cause should not be remanded to the Board of Tax Appeals to afford Petitioner an opportunity to offer evidence to disprove assumptions and inferences of fact made by the Board in support of a conclusion deemed by it controlling which was first mentioned in its opinion and which was wholly inconsistent with an underlying assumption of fact upon which both the Commissioner and Petitioner had proceeded from beginning to end of the case.

Statutes Involved.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 111. Determination of Amount of Gain or Loss.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * * *

(d) *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * * *

Sec. 112. Recognition of Gain or Loss.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, * * *

* * * * * *

Sec. 113. Basis for Determining Gain or Loss.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *

* * * * * *

Sec. 115. Distributions by Corporation.

* * * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock,

and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * * * *

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In failing to hold that Petitioner sustained a deductible tax loss in 1928 upon the liquidation of Mechanics Securities measured by the difference between the market value of its stock (not less than $5,270,545.94) issued in exchange for the stock of Mechanics Securities and the amount received as a final liquidating dividend ($444,816.94).

2. In failing to hold that the 100,000 shares of Mechanics Securities constituted the sole consideration for the 100,000 shares of Petitioner issued in exchange therefor.

3. In sanctioning the action of the Board in deciding the matter before it upon a theory wholly inconsistent with an underlying assumption of fact upon which both Petitioner and the Commissioner had proceeded throughout the case, without opportunity to Petitioner to disprove unwarranted assumptions and inferences made by the Board which were necessary to support its theory.

4. In holding that the case involved only disputed questions of fact.

5. In affirming the decision of the Board.

Reasons Relied On for the Allowance of the Writ.

The court below in approving the action of the Board of Tax Appeals in deciding the controversy upon a ground inconsistent with an underlying assumption of fact indulged in by both parties throughout the entire proceeding, without an opportunity to refute by evidence assumptions and inferences of fact made by the Board necessary to its decision, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Cf. *Hormel* v. *Helvering,* U. S. , 61 S. Ct. 719, 85 L. Ed. 651; *Helvering* v. *Richter,* U. S. , 61 S. Ct. 723, 85 L. Ed. 656; both decided March 17, 1941.

As above stated, both the Commissioner and the Petitioner assumed as a fact that the sole consideration for the 100,000 shares of Petitioner's stock was the 100,000 shares of Mechanics Securities stock for which they were exchanged. No suggestion to the contrary was made during the whole course of the proceeding until the final decision and opinion of the Board of Tax Appeals. That fact was assumed in the Commissioner's statement attached to his notice of deficiency. It was assumed by Petitioner in its petition to the Board of Tax Appeals for redetermination. It was assumed by both the Commissioner and Petitioner in entering into the stipulation of facts, in the taking of testimony and in the hearing and argument before the Board. The fact so assumed was fundamental.

The Board of Tax Appeals, although expressly stating that both parties had proceeded under that assumption of fact and conceding that if such assumption was correct the total amount determined as the fair market value of the 100,000 shares of Petitioner represented the cost of the Me-

chanics Securities stock (R. 59), reached a directly contradictory conclusion, holding that the 100,000 shares of Mechanics Securities stock did not constitute the sole consideration for Petitioner's 100,000 shares.

The Board purported to base its conclusion upon an examination of all of the circumstances of the merger of the two banks, the organization of Mechanics Securities and the exchange of stock of Petitioner and of Mechanics Securities. It rejected the only direct testimony in the record as to the reason why 100,000 shares of Petitioner's stock were issued to the stockholders of Mechanics Securities which had assets of only $500,000. That testimony by the treasurer of Petitioner was that the motive of Petitioner was to preserve the parity of ownership of the stock of Chase Bank and of Petitioner, that it was necessary that every share of Mechanics Securities be deposited under the exchange agreement and to that end it was necessary to offer special inducement to the stockholders of Mechanics Securities (R. 115-116).

The Board said:

> "If the maintenance of such joint and equal ownership had been the controlling factor the most logical method of accomplishing that result would have been through the proration of the assets of the Mechanics Bank to petitioner and the Chase Bank so that the Mechanics Bank would furnish the same percentage of capital to each corporation and through the issuance of stock to the Mechanics Bank stockholders on the basis of the percentage so determined." (R. 62-63).

The Board then set forth figures which it claimed showed "that the Mechanics Bank was furnishing approximately 33 percent of the net assets of the consolidated

bank and its stockholders were receiving only 25 percent of the stock of such bank while the Chase Bank was furnishing only slightly more than 67 percent of the net assets and its stockholders were receiving 75 percent of the stock" (R. 63).

Even if the Board's figures were correct (and there is no evidence to support them), its conclusion is sheer conjecture and is tantamount to a substitution of its judgment for that of the management and the directors of Petitioner. The Board, it would appear, did not consider the fact that under the applicable consolidation statute (Act of November 7, 1918, c. 209, 40 Stat. 1043) only a two-thirds vote of the stockholders of Mechanics Bank was required and that if the merger had become effective all the stockholders of Mechanics Bank would have been entitled to receive shares of the consolidated bank, whereas there was no method of compelling any who did not elect to do so to accept shares of Petitioner in exchange for shares of Mechanics Securities and to deposit the shares of Petitioner along with the shares of the consolidated bank. Nor, apparently, was any thought given to the fact that the stockholders of Mechanics Bank had theretofore had their investment solely in a banking business and there was no assurance that they would have been willing to divide their investment between a bank and a corporation engaged in a general securities business, proportionately on the basis of their respective assets. It was vitally important to Petitioner that every share of Mechanics Securities stock should be exchanged for a share of its own stock in order that the parity of ownership of shares of stock of the Bank and of Petitioner should be maintained and it was not only logical, but necessary, that special inducement should be made so as to avoid any risk of that result not being accomplished.

We do not need to rely alone upon such reasoning, however. The figures by which the Board attempted to support its conclusion are not only demonstrably incorrect on the record before it, but are based upon an assumption of fact which has no support whatever in the record. The figures are set forth in a footnote (R. 63) in the Board's opinion as follows:

	"Net assets prior to merger, April 10, 1926	Total net assets after merger
Chase Bank	[1] $53,035,531.29 (67.0884476 plus ....%)	.....
Mechanics Bank	[2] $26,017,618.90 (32.9115523 plus ....%)	.....
Consolidated Bank	.....	$79,053,150.19 (100%

[1] Including $10,000,000 new capital and excluding $4,500,000 charged against total undivided profits of the merged banks and credited to suspense.

[2] Includes $412,581.13 credited to total undivided profits of the merged banks in excess of the closing figure as shown by Mechanics' books."

These figures are based upon an exhibit marked "Respondent's [Commissioner's] Exhibit N" (R. 274, 275) which is part of the stipulation of facts (R. 103, 105). It will be observed that the figure ($53,035,531.29) of net assets (reflected in capital, surplus and undivided profits) of Chase Bank prior to the merger, as stated by the Board, does not appear in Exhibit N, nor does it appear anywhere else in the record. The correct figure is stated in Respondent's Exhibit N as $47,535,531.29. The Board's figure is arrived at by adding to said correct amount the $10,000,000 of new capital contributed by stockholders of the Chase Bank and deducting therefrom $4,500,000 which after the merger was "Charged against total Undivided Profits of the merged banks and credited to Suspense" (R. 275). Such deduction was arbitrary and without justification on the record before the Board. There is not one syllable of testimony or evidence in the record which even suggests that said amount should be charged against the contribu-

tion of the Chase Bank to the consolidated bank. We do not claim that any inference or assumption should be made with respect to that subject, as it would seem to be clearly a matter for proof if the fact were material.* But if conjecture were to be indulged in, would it not be at least as reasonable to suppose that the whole of the amount should be charged against assets of the Mechanics Bank in order to conform to the basis of valuation on which the Chase Bank carried similar assets? If that were done and if relative percentages have the importance which the Board attaches to them, it is strikingly significant that the Chase Bank would have contributed approximately 73% and Mechanics Bank approximately 27% of the total net assets of the consolidated bank and the disparity in the proportionate stock interests in the consolidated bank as compared with their respective contributions would have been so negligible as not even to have been the subject of comment. It is noteworthy also that the Board has used net asset figures and no consideration is given to other elements of value such as good will, value of name, management, prospects, etc., of the respective banking institutions.

The Board was unwilling to accept the assumption of fact that Petitioner's stock was issued solely for the Mechanics Securities stock (although such assumption, it conceded (R. 59), was supported by the literal wording of the exchange agreement) because of the disparity in value of the securities exchanged.

This same reluctance was manifested by the Board in *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, where it declined to give effect to the plain intention of the parties to effect exchanges of property having considerable disparity of

* It could be shown, if opportunity were afforded, that there is no basis in fact for charging said amount against the assets contributed by Chase Bank.

value. In that case as in this it held that property received in exchange did not constitute the entire consideration for shares of stock exchanged. The Circuit Court of Appeals reversed the decision of the Board and this Court affirmed, holding that while the circumstantial facts must be taken as established by findings of the Board if supported by substantial evidence (p. 490), the ultimate finding by the Board on the question of consideration was "a conclusion of law or at least a determination of a mixed question of law and fact", that it was "to be distinguished from the findings of primary, evidentiary or circumstantial facts", and that it was "subject to judicial review and, on such review, the court may substitute its judgment for that of the Board" (p. 491).

In this case the Circuit Court of Appeals in effect declined to review the decision of the Board, holding that there were involved only disputed questions of fact.

On the contrary, on this record the facts (except the value of Petitioner's stock) are undisputed and an assumption of fact made by both parties throughout the proceeding was rejected and the contrary conclusion adopted by the Board without notice and without opportunity to offer testimony or even be heard upon the question which the Board deemed conclusive.

In its petition for review in the court below Petitioner stated (R. 78-79) the respective positions taken by Petitioner and the Commissioner before the Board of Tax Appeals, and further stated that the Board did not determine the issue presented by the conflicting contentions of Petitioner and the Commissioner but that

> "although, as the Board stated, both parties had proceeded with the hearing upon the assumption that petitioner issued its 100,000 shares solely for all of the authorized capital stock of Mechanics Se-

> curities Corporation, the Board adopted an entirely different theory, one which is inconsistent with the contention of respondent [The Commissioner] before the Board, one for which there is no support in the evidence, and which petitioner has had no opportunity to rebut, namely, that the 100,000 shares of Mechanics Securities Corporation were only a part of the consideration which petitioner received for the 100,000 shares of its stock issued to the stockholders of Mechanics Securities Corporation."

In its assignments of error Petitioner complained of the findings and rulings made by the Board on that subject as being wholly unsupported by evidence in the record (R. 80-85).

Under similar circumstances the United States Circuit Court of Appeals for the Seventh Circuit held that the Board should have decided the case before it on the issues tried. *Booth Fisheries Co.* v. *Commissioner,* (C. C. A. 7th) 84 F. (2d) 49. There the taxpayer, a domestic corporation, claimed the right to take a deduction in a consolidated return for losses sustained by Canadian subsidiaries. Both the taxpayer and the Commissioner had proceeded before the Board of Tax Appeals upon the assumption that the losses claimed had been sustained and the case was tried on that theory, the sole issue being the purpose for which the subsidiaries were maintained. The Board, however, on its own motion found that the losses had not been proved and ruled against the taxpayer. The court reversed, saying (84 F. (2d) p. 51):

> "We are inclined to agree with petitioners that the effect of the conduct of respondent, coupled with the report of his agent, and other documentary proof in the record, was a concession of the asserted loss of the Canadian Companies, and that it would be manifestly unfair to the taxpayers, if they be

> otherwise entitled to credit for such loss, to deny their claim on the basis of their failure to prove a loss before the Board when no active controversy had arisen about the actual loss, but only with the right to claim such loss as a deduction. See *Helvering* v. *Taylor,* 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 623, and cases there cited."

Petitioner contends that upon the record before this Court, effect should be given to the assumption of fact and the decision of the Board of Tax Appeals should be reversed, and judgment entered dismissing the deficiency claim of the Commissioner and allowing Petitioner's claim for refund of tax paid for the calendar year 1928 in the sum of $55,638.90. Petitioner's claim is based, as above stated, on its loss of not less than $4,825,729 during that calendar year measured by the difference between the value of its 100,000 shares of stock and the final liquidating dividend received by it upon the dissolution of Mechanics Securities. The Board of Tax Appeals stated in its opinion that "those shares, when issued, represented 25 percent of the total authorized and outstanding stock of a prosperous corporation, a corporation which owned net assets amounting to at least $21,082,183.76 and for each of the five years preceding had net profits in excess of $1,500,000 and for each of the four preceding years had paid dividends amounting to $800,000." (R. 62). The value of its stock was clearly established as not less than $5,270,545.94 and as stated by the Board, if the assumption of fact upon which the case was based is correct "the total amount determined as the fair market value of the said 100,000 shares of petitioner represents the cost of the Mechanics Securities stock" (R. 59).

Petitioner therefore prays that a writ of certiorari issue bringing up the entire case to the end that this Court

may review it and direct such final judgment as it may determine to be just.

If, however, this Court should conclude that the question whether the 100,000 shares of stock of Mechanics Securities constituted the sole consideration for the 100,000 shares of stock of Petitioner issued in exchange therefor is an issue which should be determined notwithstanding the record in this case and the assumption of that fact throughout by both parties, Petitioner earnestly contends that such issue should be determined only after it has been afforded an opportunity to introduce evidence and to be heard upon it before the Board of Tax Appeals. Petitioner in that event prays that this Court issue a writ of certiorari and that the judgment of the court below be reversed with directions to remand the case to the Board of Tax Appeals to afford Petitioner such opportunity.

Similar relief was granted by this Court in *Hormel* v. *Helvering,* ..... U. S. ....., 61 S. Ct. 719, 85 L. Ed. 651, and *Helvering* v. *Richter,* ..... U. S. ....., 61 S. Ct. 723, 85 L. Ed. 656, both decided March 17, 1941, two weeks after the opinion in this case was handed down by the court below and the day before the time within which to apply for a rehearing expired under its rules. Both cases involved income from trusts and in both cases the Commissioner and the taxpayer had proceeded before the Board of Tax Appeals on the assumption that Section 166 of the Revenue Act of 1934 was controlling. After the cases had been decided by the Board of Tax Appeals, this Court held in *Helvering* v. *Clifford,* 309 U. S. 331, that under Section 22(a), 26 U. S. C. A. Int. Rev. Acts, page 669, the income of certain trusts was taxable. In the Circuit Courts of Appeals the Commissioner in each case abandoned reliance on Section 166 and argued that the income was tax-

able under Section 22(a). The taxpayer contended that Section 22(a) was not open for consideration since it had not been relied on before the Board. This Court held that it was proper for the Circuit Courts of Appeals to take into consideration the applicability of Section 22(a) but that the taxpayer should not be "foreclosed from all opportunity to offer evidence before the Board on this issue, however remote may be his chance to take his case out of the Clifford rule" (61 S. Ct., p. 723). Accordingly, the order in each case was a reversal of the judgment of the Circuit Court of Appeals with appropriate directions to the Board of Tax Appeals for further proceedings.* In the *Hormel* case this Court said in footnote 10 of its opinion:

> "In this connection petitioner pointed out in his brief before the Circuit Court of Appeals that 'If any contention whatsover had at any time been suggested or considered as to Section 22, the matter of the evidence introduced or to be introduced would have required further consideration'."

In the *Richter* case this Court said:

> "Respondent urges that had he been advised with fair certainty that the Government relied upon section 22(a), he could have introduced additional evidence directed to that issue."

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* Following this Court's decisions in the *Hormel* and *Richter* cases, the United States Circuit Court of Appeals for the Sixth Circuit in *Commissioner of Internal Revenue* v. *Central National Bank of Cleveland* (.... F. (2d) ...., decided May 8, 1941), remanded to the Board of Tax Appeals for further evidence a case which had been tried before the Board on stipulation and evidence relating exclusively to the question whether the estate was taxable under Section 166, the Commissioner having invoked Section 22(a) for the first time in the Circuit Court of Appeals.

In those cases the question was whether the appellate court should consider an issue not raised before the Board of Tax Appeals. Here the question is whether the Board of Tax Appeals should have decided a question which not only was not in issue before it but which was supposedly beyond controversy because of the asumption of fact made by both parties. It would seem that in such a case there would be the greater reason for affording an opportunity to meet the issue raised for the first time by the Board of Tax Appeals in its final decision.

Certainly had Petitioner been advised that, contrary to the assumption of fact made both by the Commissioner and Petitioner throughout the proceedings before the Board, any question would be raised that the 100,000 shares of Mechanics Securities stock did not constitute the sole consideration for its 100,000 shares issued in exchange therefor, Petitioner not only would have given further consideration to "the matter of the evidence introduced or to be introduced" but could and would have introduced evidence directed to that issue.

Petitioner has been denied a hearing on the question which the Board itself first raised in its final decision and which it deemed decisive of the case and which had not been in controversy because of an assumption of fact by both parties throughout the proceeding. This would seem to be a serious "departure from the accepted and usual course of judicial proceedings" calling upon this Court for the exercise of its power of supervision.

Moreover it is submitted that the decision of the court below in sanctioning such a departure is in conflict with

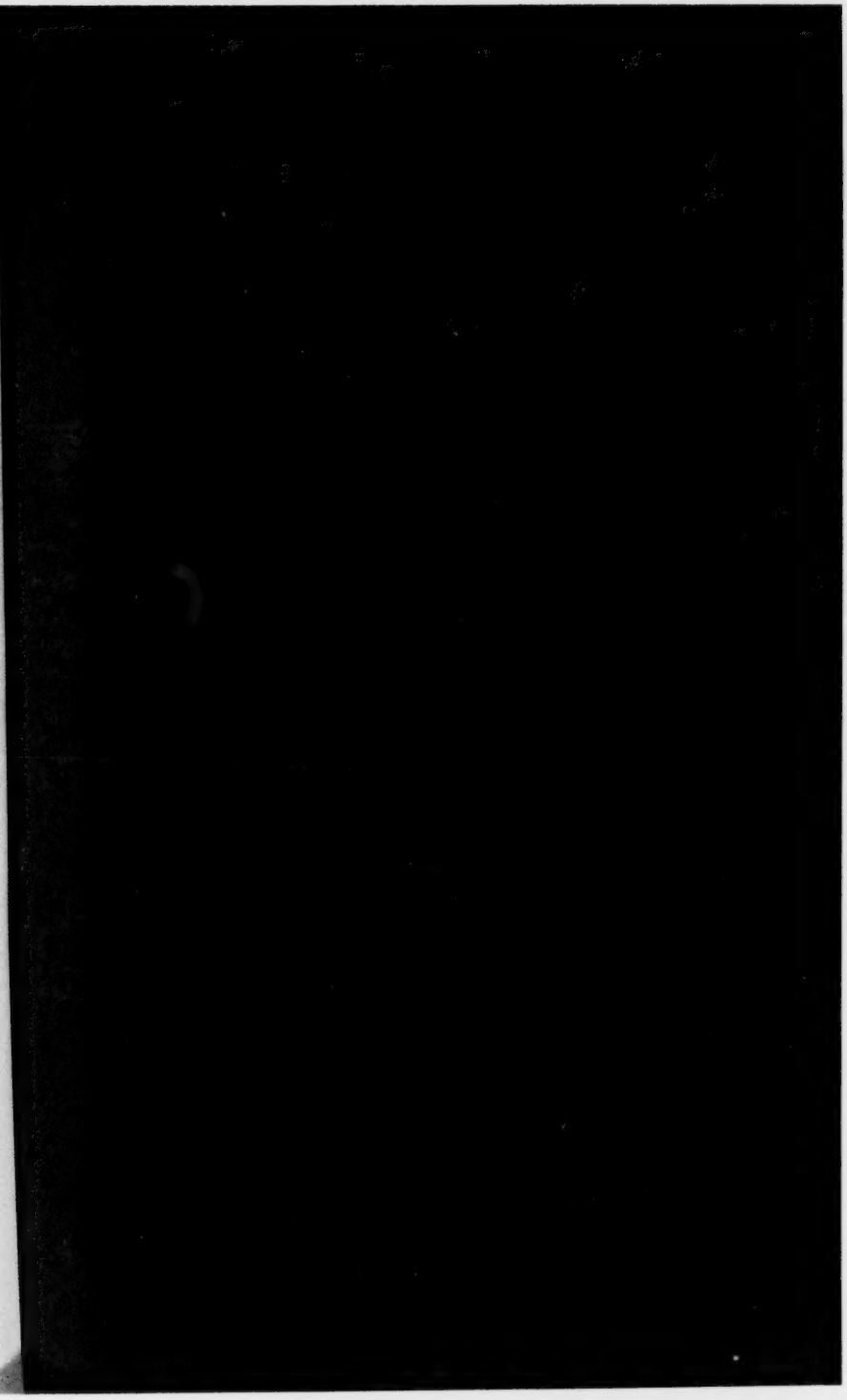
the principles applied by this Court in the *Hormel* and *Richter* cases, *supra,* and with the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Booth Fisheries Co.* v. *Commissioner,* 84 F. (2d) 49, *supra.*

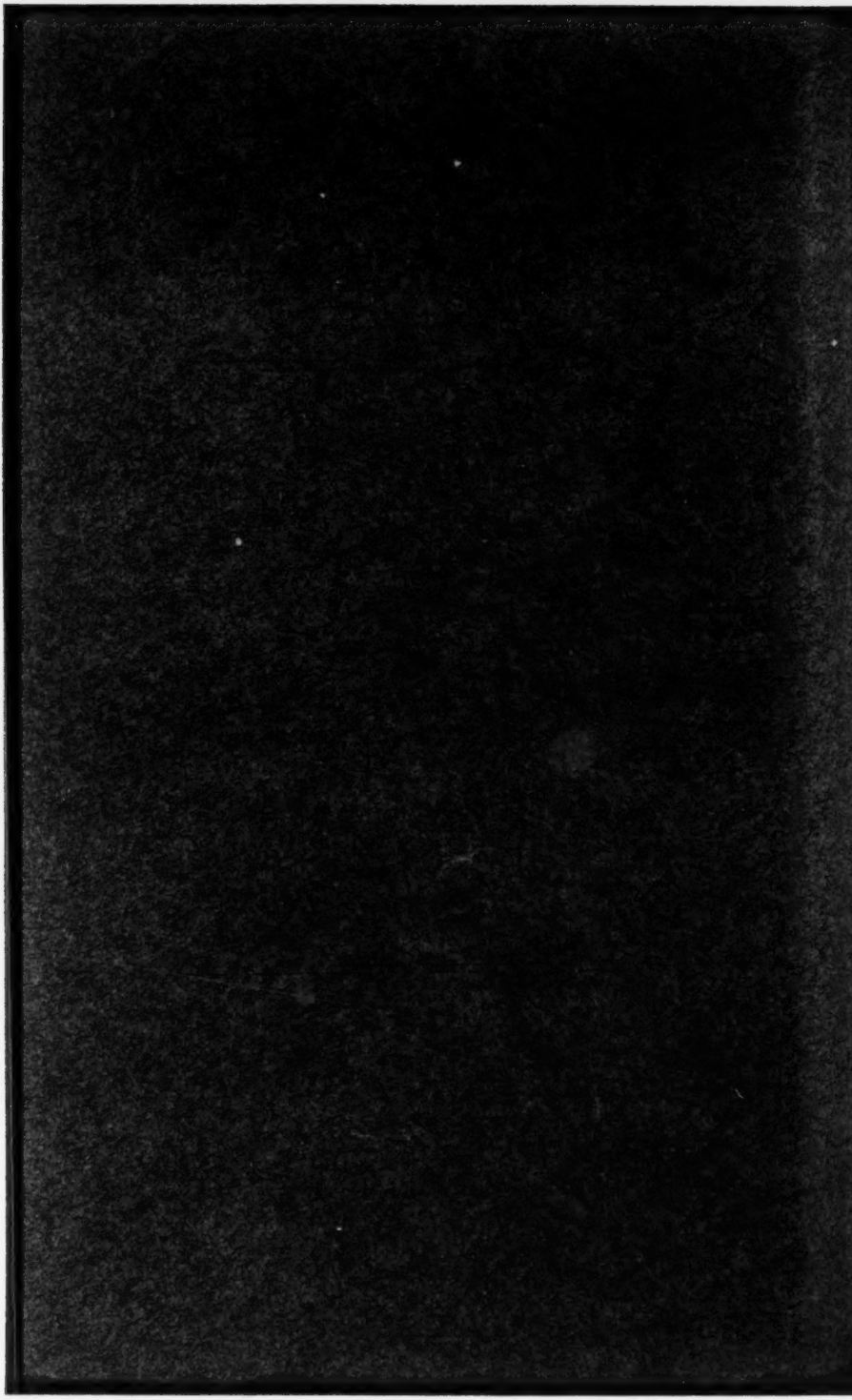
WHEREFORE, Petitioner prays that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

BERTRAM F. SHIPMAN,
Attorney for Petitioner.

May 1941.





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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 113

AMEREX HOLDING CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Board of Tax Appeals (R. 19–66) are reported in 37 B. T. A. 1169. The *per curiam* opinion of the Circuit Court of Appeals for the Second Circuit (R. 762) is reported in 117 F. (2d) 1009.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1941. (R. 762–763.) The petition for a writ of certiorari was filed May 31,

1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

During the tax year Mechanics Securities Corporation was liquidated and the taxpayer, as its sole stockholder, received all of its assets, consisting of $444,816.94 in cash, as a liquidating dividend. Under the applicable provisions of the Revenue Act of 1928, the taxpayer, in computing its net income, was entitled to deduct as a loss the difference, if any, between the amount received as a liquidating dividend and the cost to it of the Mechanics Securities stock. The ultimate issue in this case is whether that stock cost respondent $500,000, as the Board found, or $5,270,545.94, as the taxpayer contends. This issue, in turn, depends upon whether, in the transaction pursuant to which the taxpayer received the Mechanics Securities stock, the taxpayer, as it contends, issued its own stock, allegedly worth $5,270,545.94, solely in consideration for the Mechanics Securities stock, or whether the Mechanics Securities stock, as the Board found, was only a part of the consideration for the issuance of the taxpayer's stock.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(d) *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, * * *

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *

* * * * *

SEC. 115. DISTRIBUTION BY CORPORATIONS.

* * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * * *

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 20–51), may be summarized as follows:

Organization of the taxpayer.—The taxpayer is a New York corporation organized in 1917 under the name of Chase Securities Corporation. It was formed as a securities affiliate of The Chase National Bank of New York in order to take advantage of business opportunities which were not available to the bank because of its limited corporate powers, and to engage in a general securities business. (R. 21–22.) It was formed in the following manner:

All of the stockholders of Chase Bank became parties to a deposit agreement between a committee of Chase Bank stockholders and Bankers Trust Company, as depositary, and deposited

thereunder their shares, then aggregating 100,000. A special dividend of $25 per share was paid by Chase Bank to the committee, which acted throughout as agent for the depositing stockholders. The committee then caused the taxpayer to be organized with $2,500,000 capital, represented by 100,000 shares without par value, which were subscribed for in the names of the depositing Chase Bank stockholders, paid for with the proceeds of the special dividend, delivered to the committee, and deposited under the deposit agreement. To evidence the ownership of the deposited shares of Chase Bank and of the taxpayer, the depositary issued to each depositing stockholder a definitive engraved receipt in registered form certifying that it held in his name a certificate for his shares of Chase Bank stock and a certificate for his shares of taxpayer's stock. (R. 21–22.)

Each of the depositing stockholders agreed that he would not sell any of his shares of stock of either Chase Bank or the taxpayer without at the same time selling to the same purchaser an equal number of shares of the other. The taxpayer's certificate of incorporation provided that no shares of its stock issued to any Chase Bank stockholder should be transferable except together with an equal number of shares of Chase Bank stock. The certificate further provided that the sale, pledge, or transfer of any shares of stock of the Chase Bank should "operate *ipso facto* as a

transfer to the same person of a like interest and an equal number of shares of this corporation." (R. 22–23.) An amendment to taxpayer's charter in 1926 provided that no shares of the taxpayer's stock should be issued unless made available for deposit under the deposit agreement and that no stockholder should be entitled to subscribe for newly issued stock of the taxpayer unless at the same time he subscribed for an equal number of shares of Chase Bank stock and deposited all such shares with the depositary (R. 45–46).

The purpose of the foregoing arrangement was to establish and maintain 100% parity of ownership of stock of the Chase Bank and of the taxpayer, and such parity was maintained during all the times here involved. Prior to 1926 the outstanding shares of Chase Bank were increased to 200,000, and the outstanding shares of petitioner were correspondingly increased and all additional shares of each were deposited under the deposit agreement. (R. 23, 36–37.)

Organization of Mechanics Securities and the acquisition of its stock by the taxpayer. On February 11, 1926, Chase Bank and the Mechanics & Metals National Bank (hereinafter called Mechanics Bank) entered into an agreement for the consolidation of the two banks under the name and charter of Chase Bank (R. 23–24).

The consolidation agreement provided that the consolidated bank should have a capital of $40,-

000,000, a surplus of $25,000,000 and, subject to certain conditions, undivided profits of not less than $14,000,000, or a total of not less than approximately $79,000,000; that the capital should be divided into 400,000 shares of $100 par value, of which 200,000 shares should be allotted to the then stockholders of Chase Bank, share for share, 100,000 should be offered to the then stockholders of Chase Bank for subscription at $100 per share, and 100,000 should be allotted to the stockholders of Mechanics Bank, share for share (R. 23–24).

The consolidated bank was to receive all of the assets of each bank except assets of the Mechanics Bank of a value of $500,000, and to assume all of their liabilities. The agreement provided that the net assets to be furnished by the Chase Bank should equal "not less than approximately" $55,000,000 and that the net assets to be furnished by the Mechanics Bank should equal not less than approximately $24,000,000. It was further provided that the assets of the Mechanics Bank aggregating $500,000, which were excepted from the transfer to the consolidated bank, should be transferred before the effective date of consolidation to a new corporation, the stock of which was to be distributed *pro rata* to the shareholders of the Mechanics Bank or their assigns, upon terms and conditions deemed proper by its board of directors. (R. 24–25.)

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At the same meeting of the board of directors of the Mechanics Bank on February 11, 1926 at which the agreement for consolidation was approved, action was taken to organize the new corporation referred to in the consolidation agreement which was to receive the $500,000 excepted assets of the Mechanics Bank. Provision was made, however, that if the consolidation of the two banks should for any reason not become effective in the manner provided in the agreement of consolidation, the assets transferred to the new corporation should be retransferred to the Mechanics Bank. The new corporation, whose organization was thus approved was later designated as the Mechanics Securities Corporation. (R. 25.)

On the same date, February 11, 1926, and as part of the consolidation plan, the taxpayer entered into an "exchange agreement" with a committee of Mechanics Bank stockholders and agreed that if the merger of the Mechanics Bank and Chase Bank became effective, the taxpayer would exchange 100,000 shares of its stock, share for share, for stock of Mechanics Securities Corporation, the new corporation to be formed. (R. 25, 31–36.)

Two days later, on February 13, 1926, the Mechanics Bank mailed to its shareholders a notice of a special meeting to be held on March 18, 1926, to vote upon "the ratification and confirmation of the terms and conditions" of the proposed consolidation of the Chase Bank and the Mechanics

Bank (R. 41). This notice, after describing the plan and pointing out that the stockholders of Mechanics Bank would receive one share of the consolidated bank stock for each share of Mechanics Bank stock then held, continued (R. 42): "In addition, the shareholders of this bank will be given the opportunity to acquire, without additional cost, one share of capital stock of no par value of Chase Securities Corporation for each share of stock of the consolidated bank to be allotted to them". The notice concluded with the statement that under the plan each depositing shareholder of the Mechanics Bank would be entitled to receive, after the consolidation had become effective, one share of Chase Bank stock and one share of Chase Securities stock for each share of Mechanics Bank stock deposited (R. 43).

On March 6, 1926, Mechanics Securities Corporation was incorporated under the laws of New York with an initial capital of $500,000, represented by 100,000 shares of $5 par value (R. 44). Prior to the consolidation, and pursuant to the consolidation agreement, Mechanics Bank transferred to Mechanics Securities (subject to retransfer in event the merger should not become effective) a note receivable for $500,000, and the latter issued 100,000 shares of its stock in the names of the stockholders of Mechanics Bank (R. 46–47).

On March 18, 1926 special meetings of the stockholders of the Chase Bank, the taxpayer and the

Mechanics Bank were held and the various interrelated agreements which formed parts of the consolidation plan were approved. At the meeting of the taxpayer's stockholders, the exchange agreement was ratified, an increase in authorized stock from 200,000 to 400,000 shares was approved and a proposal was approved to offer 100,000 of the additional shares to the taxpayer's then stockholders for subscription at $5 per share (exercisable only on subscription at $100 per share for an equal number of shares of Chase Bank) and to issue the remaining 100,000 shares in accordance with the exchange agreement. (R. 44–46.)

The merger of the two banks became effective at the close of business April 10, 1926 (R. 47). Thereafter, from April 12, 1926 to December 27, 1927, pursuant to the exchange agreement, the taxpayer issued and delivered 100,000 shares of its stock to the Mechanics Bank stockholders, and received from them 100,000 shares of Mechanics Securities stock (R. 49). Thus all stockholders of Mechanics Bank who acquired shares of consolidated bank stock as a result of the consolidation acquired an equal number of shares of the taxpayer's stock. The 100,000 shares of Chase Bank stock offered to its stockholders at $100 per share and the 100,000 shares of the taxpayer offered to its stockholders at $5 per share were fully subscribed for, issued and delivered. All of the 200,000 additional shares of Chase Bank and all

of the 200,000 additional shares of the taxpayer were deposited under the deposit agreement and the parity of ownership of Chase Bank stock and of the taxpayer's stock thus remained as complete after the consolidation as before. (R. 100–101.)

In the five years prior to the consolidation, the taxpayer had shown profits ranging between $1,600,000 and $2,800,000 per year and had paid dividends of $800,000 per year in the last four of those years. Between April 10, 1926 and December 27, 1927, the taxpayer's assets consistently exceeded its obligations by more than $21,000,000. Between April 3, 1926 and June 26, 1926 the price of units of one share of consolidated bank stock and one share of stock of the taxpayer ranged between $405 and $435. (R. 49–50.)

Financial contributions to the consolidation.— As shown by their books, just prior to the merger the net assets of Chase Bank were $47,535,531.29 and those of Mechanics Bank were $25,605,037.77 (R. 47). On this basis, and adding to the Chase Bank assets the $10,000,000 of new capital supplied by its stockholders, Chase Bank furnished approximately 69% and Mechanics Bank approximately 31% of the total assets of the new bank. However, these book valuations were adjusted when the books of the new bank were set up, the new books showing net assets of only $79,053,150.19 (R. 47). The adjustment appears to have been made by writing

down the book value of the Chase Bank assets by $4,500,000 and writing up the book value of the Mechanics Bank assets by $412,581.13, leaving a net write-down of $4,087,418.87 (R. 275). Making these adjustments, the Board computed that $53,-035,531.29 of the net assets of the consolidated bank, or about 67 percent, were furnished by the Chase Bank, and that $26,017,618.90, or about 33 percent, were furnished by the Mechanics Bank (R. 63). The Board further concluded that, taking the total net assets of the consolidated bank and of the taxpayer together, approximately 74 percent of the assets were contributed by the stockholders of Chase Bank and of the taxpayer as it existed before the merger, and approximately 26 percent contributed by the stockholders of the Mechanics Bank (R. 64). Because of these facts, because of the fact that the stockholders of Chase Bank and the taxpayer were identical, and because it determined that the taxpayer, a $21,000,000 corporation, would not have issued one fourth of its stock for other stock worth, at most, $500,000, the Board concluded that taxpayer's stock was issued, not alone for Mechanics Securities stock, but also as part of the consideration to the Mechanics Bank stockholders for their acceptance of the consolidated bank stock (R. 59–65).

Dissolution of Mechanics Securities.—Mechanics Securities was dissolved on October 26, 1928, and

on October 29, 1928, it was completely liquidated and the taxpayer received all of its assets, consisting of $444,816.94 in cash, as a first and final liquidating dividend (R. 50). Prior to the consolidation the taxpayer carried the stock of the Mechanics Securities Corporation on its books in its investment account at $500,000. After the dissolution the taxpayer debited its cash account with $444,816.94, the amount received, debited its profit and loss account with $55,183.06, and credited its investment account with $500,000. (R. 50.)

In its income-tax return for the year 1928 the taxpayer claimed a loss of $4,307,066.58 upon the liquidation of Mechanics Securities Corporation, represented as the difference between taxpayer's alleged cost of its 100,000 shares of Mechanics Securities stock and the amount which it received upon liquidation of that corporation. Taxpayer reported a net income of $463,657.52, after deduction of the claimed loss, in respect of which it paid to the Collector a tax of $55,638.90. (R. 50–51.)

The Commissioner determined that the cost to the taxpayer of the Mechanics Securities stock was $500,000 and accordingly reduced the loss deduction from $4,307,066.58, as claimed, to $55,183.06 (R. 51), and determined a deficiency of $510,226.02 against the taxpayer for the year 1928 (R. 12–15). The Board of Tax Appeals found that the cost to the taxpayer of the Mechanics Securities stock was not in excess of $500,000 (R. 51, 65) and sus-

tained the deficiency (R. 67).[1] The Circuit Court of Appeals affirmed *per curiam* (R. 762).

ARGUMENT

1. The Board found as a fact that the taxpayer, a corporation with net assets worth more than $21,000,000, did not issue one-fourth of its stock, worth more than $5,000,000, in return solely for the Mechanics Securities stock, which was worth at most $500,000. It found, rather, that "the consolidation of the Mechanics Bank with the Chase Bank was part of the consideration for the agreement on petitioner's part to issue 100,000 of its shares to the stockholders of the Mechanics Bank" and further that "the receipt of those shares by the Mechanics Bank stockholders was part of the consideration for their approval of the merger of that bank with the Chase Bank" (R. 61). Finally, the Board found as a fact that "the portion of the fair market value of petitioner's said shares which may be determined as the cost of the Mechanics Securities stock was not in excess of $500,000 * * *" (R. 65).

These findings of the Board, which were expressly held by the court below to be "amply supported by the record" (R. 762), are determina-

[1] After the Board hearing the Commissioner, upon the theory that no deductible loss at all was indicated by the proof, filed an amended answer so asserting. This contention was rejected by the Board (R. 65–66) and the Commissioner did not appeal.

tive of this case, for they establish (1) that the taxpayer's 100,000 shares of stock were not issued solely for the Mechanics Securities stock; (2) that the Mechanics Securities stock was the consideration for the issuance of at most $500,000 worth of taxpayer's stock; and (3) that therefore the cost of the Mechanics Securities stock to the taxpayer was not in excess of $500,000. On the basis of these findings, petitioner's deductible loss on the liquidation of Mechanics Securities Corporation was, of course, not $4,307,066.58, as claimed, but at most $55,183.06, as allowed.

The petition for a writ of certiorari seeks, in effect, to have this Court review the substantiality of the evidence supporting these findings of the Board. Certiorari will, of course, ordinarily not be granted for such a purpose. *National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U. S. 206, 208. And here, as the court below held, the record furnishes ample support for the Board's conclusion.

It is plain, as the Board found, that the taxpayer would not have issued 100,000 shares, or one-fourth of its stock, worth more than $5,000,000, merely for the stock of Mechanics Securities Corporation, whose sole asset was a $500,000 note receivable. It is equally plain, as the Board also found, that the stockholders of Mechanics Bank would not have agreed to a merger of their bank, having net assets of $26,017,618.90, with Chase

Bank, having net assets of $53,035,531.29 in consideration of one-fourth of the stock of the consolidated bank. The Mechanics Bank stockholders agreed to the consolidation because, in addition to receiving a share of Chase Bank stock for each share of Mechanics Bank stock, they also received a share of taxpayer's stock. And the taxpayer agreed to give shares of its stock to the Mechanics Bank stockholders for shares of Mechanics Securities stock in order to induce the Mechanics Bank stockholders to agree to the consolidation; this was of advantage to all of the taxpayer's stockholders because each of them had the same number of shares of Chase Bank stock as of the taxpayer's stock.

Stated otherwise, the exchange of taxpayer's stock for Mechanics Securities stock was simply an integral part of a single consolidation plan which contemplated, not that the Mechanics Securities stock should be the consideration for the taxpayer's stock, but that 100,000 shares of the taxpayers' stock plus 100,000 shares of the consolidated bank stock should be the consideration to the Mechanics Bank stockholders for their contribution to the consolidated bank and the taxpayer, taken together, of all the Mechanics Bank assets. The essence of the plan, reading all of the interrelated agreements together, was that the Mechanics Bank should furnish approximately one-fourth of the net assets of the consolidated bank and of the taxpayer, taken together, and in

return the stockholders of Mechanics Bank were to get one-fourth of the stock of the consolidated bank and one-fourth of the taxpayer's stock. The division of the Mechanics Bank assets between the consolidated bank and the taxpayer was wholly arbitrary; in view of the parity of ownership of the stock of the Chase Bank and of the taxpayer, preserved after as before the consolidation, it made no difference to the stockholders whether the Mechanics assets were given to the consolidated bank, to the taxpayer, or, if to both, in what proportion they were given to each.

In these circumstances, it is clear that the Board correctly found that the 100,000 shares of taxpayer's stock were not issued merely as consideration for the stock of the Mechanics Securities Corporation, but also as part of the consideration for assets which the Mechanics Bank transferred to the consolidated bank. No other conclusion seems possible on the record. And, at the least, the Board's conclusion is supported by substantial evidence.

2. Taxpayer asserts that both parties at the Board hearing assumed that the sole consideration for the taxpayer's stock was the Mechanics Securities stock, and that since the Board's decision was based upon a denial of this assumption, the taxpayer is entitled to further opportunity to present proof on the issue. The Commissioner, however, has consistently taken the position that there was no warrant for using the excessive cost basis

claimed by the taxpayer in computing its loss. Although the Commissioner's reasons for his position have varied somewhat, he at no time conceded that the only consideration for the taxpayer's stock was the Mechanics Securities stock. To the contrary, he took pains to establish the relationship of the exchange to the bank merger and the connection between the Chase Bank stock and taxpayer's stock, as the stipulation of facts shows (R. 91–104). The burden was on the taxpayer of proving that it had suffered a loss and the amount of loss; that burden, of course, includes the burden of proving the cost of the assets which caused the alleged loss. *Burnet* v. *Houston,* 283 U. S. 223, *Helvering* v. *Taylor,* 293 U. S. 507, 514. No action taken by the Commissioner before the Board relieved the taxpayer of that burden.

The cases referred to in the petition are in no respect in conflict with the decision here. In *Booth Fisheries Co.* v. *Commissioner,* 84 F. (2d) 49 (C. C. A. 7th), the Commissioner had conceded the amount of loss deductible if the taxpayer was entitled to the loss as a matter of law. The court held that, in view of this concession, the failure of the taxpayer to prove the amount of the asserted loss did not defeat its right to a deduction for such loss. Here, however, the Commissioner has never ceased to question the amount of loss claimed by the taxpayer and the cost basis upon which it was calculated.

In *Hormel* v. *Helvering,* and *Helvering* v. *Richter,* Nos. 257 and 516, October Term 1940, decided March 17, 1941, this Court remanded the causes to the Board for the taking of further testimony because the Board was reversed on a theory not considered by it. Here, however, the Board has been sustained in a conclusion which is inescapable from the evidence presented to it. If the Board has thought that additional evidence might have been adduced to change that conclusion, it could have called for a rehearing upon its own motion. Taxpayer could also have moved for a rehearing, but it failed to do so. In these circumstances, the court below clearly did not err in failing to remand the case to give petitioner further opportunity to show that it issued $5,000,000 worth of its own stock solely for $500,000 worth of Mechanics Securities stock.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1941.

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